No. 48788-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Skylar Nemetz,

Appellant.

Pierce County Superior Court Cause No. 14-1-04212-6

The Honorable Judge Jack Nevin

Appellant's Opening Brief

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2. The state failed to prove that Mr. Nemetz was "within proximity of an easily and readily available [firearm] for offensive or defensive purposes."

> **ISSUE 1:** A firearm enhancement may not be imposed unless the state proves beyond a reasonable doubt that the weapon was available for use for offensive or defensive purposes. Did the state fail to prove that Mr. Nemetz was "armed" within the meaning of RCW 9.94A.533(3)?

3. The firearm enhancement was imposed in violation of Mr. Nemetz's state constitutional right to bear arms under Wash. Const. art. I, §24.

4. The trial court erred by imposing a firearm enhancement where the underlying offense involved only reckless conduct.

> **ISSUE 2**: Washington's state constitution provides greater protection to the individual right to bear arms than does the Second Amendment. Does Wash. Const. art. I, §24 prohibit imposition of a firearm enhancement for conviction of a crime involving only reckless conduct?

5. The trial court erred by declining to credit Mr. Nemetz for time spent on electronic home monitoring (EHM) based on a law enacted after the date of the offense.

6. The trial court erred by ordering that Mr. Nemetz receive only 37 days credit for time served.

7. The 2015 amendment to RCW 9.94A.505 violates the state and federal *ex post facto* clauses as applied to Mr. Nemetz because it limits eligibility for reduced imprisonment for crimes committed before its enactment.

> **ISSUE 3:** The state and federal *ex post facto* clauses prohibit the retroactive application of laws that limit eligibility for reduced imprisonment. As applied to Mr. Nemetz, does the 2015 amendment to RCW 9.94A.505 violate the *ex post facto* clauses because it increases the punishment for his offense after it was committed?

8. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

> **ISSUE 4:** If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Nemetz is indigent, as noted in the Order of Indigency?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In October of 2014, Skylar Nemetz accidentally shot and killed his wife. Verdict Form C3, filed 3/3/16, Supp. CP. The two were not yet 21 years old, and hadn't been married very long. The state charged Mr. Nemetz with premeditated murder, but a jury convicted him only of the lesser charge of first-degree manslaughter. CP 1; Verdict Forms A3, B3, C3, filed 3/3/16, Supp. CP. By special verdict, the jury also found that Mr. Nemetz was armed with a firearm. Special Verdict, filed 3/3/16, Supp. CP.

The conviction reflected a jury finding that Mr. Nemetz had recklessly caused Tarrah's death. Court's Instructions filed 3/3/16, pp. 14, 17, Supp. CP; Verdict Forms B3 and C3, filed 3/3/16, Supp. CP. Mr. Nemetz had testified that he accidentally shot his wife while checking to see if one of the couple's many rifles was loaded. RP (1/25/16) 77-99.

While awaiting trial, Mr. Nemetz spent approximately 16 months on Electronic Home Monitoring (EHM) under conditions set by the court. Order Establishing Conditions of Release, filed 10/31/16, Supp. CP. Among other things, the conditions required that he remain confined to Joint Base Lewis McChord, with authorization to leave the base only to meet with his attorney or to attend court. Order Establishing Conditions of Release, filed 10/31/16, pp. 1-2, Supp. CP.

While his case was pending, the legislature amended RCW 9.94A.505, which governs credit for time served while released on EHM. Laws 2015, Ch. 287 §10. Previously, the law had imposed no restrictions on credit for EHM served prior to sentencing, so long as the confinement was solely related to the case at hand. Former RCW 9.94A.505 (2014). Following the amendment, offenders convicted of violent offenses such as manslaughter could not receive any credit for time served on EHM. Laws 2015, Ch. 287 §10.

Over Mr. Nemetz's objection, the court sentenced Mr. Nemetz under the 2015 amendment, denying him credit for the time he'd spent on electronic home monitoring. CP 4-7; RP (3/25/16) 4. As a result, Mr. Nemetz received credit only for the days he spent in custody prior to his release and following conviction. CP 36. The court also imposed a firearm enhancement. CP 35.

Mr. Nemetz timely appealed. CP 43. The trial court found him indigent for purposes of the appeal. CP 44-45.

ARGUMENT

I. THE TRIAL COURT ERRED BY IMPOSING A FIREARM ENHANCEMENT.

A. The state failed to prove that Mr. Nemetz was "armed" with a firearm under RCW 9.94A.533(3).

Due process requires the state to prove the elements of a sentencing enhancement beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Jackson*, 175 Wn.2d 155, 159, 283 P.3d 1089 (2012) (citing *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)). Here, the state failed to prove an element of the firearm enhancement. Because of this, the enhancement violated Mr. Nemetz's right to due process. *Jackson*, 175 Wn.2d at 159.

A challenge to the sufficiency of the evidence may always be raised for the first time on review. *State v. Kirwin*, 166 Wn.App. 659, 670 n. 3, 271 P.3d 310 (2012); RAP 2.5(a)(2) and (3). The appellant admits the truth of the state's evidence and all reasonable inferences that can be drawn from it. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). Here, even when taken in a light most favorable to the state, the evidence failed to prove that Mr. Nemetz was "armed" with a firearm.

Before a court may impose a firearm enhancement, the state must prove that the accused person was "armed with a firearm." RCW 9.94A.533(3). A person is "armed" when, *inter alia*, "'he or she is within

proximity of an easily and readily available [firearm] for offensive or defensive purposes…'" *State v. O'Neal*, 159 Wn.2d 500, 503–04, 150 P.3d 1121 (2007) (quoting *State v. Schelin*, 147 Wn.2d 562, 575–76, 55 P.3d 632 (2002)).[1]

In this case, the state did not prove that Mr. Nemetz was within proximity of a firearm "for offensive or defensive purposes." *O'Neal*, 159 Wn.2d at 503-504. The state sought to prove that Mr. Nemetz used the firearm for offensive purposes – that is that he used it to intentionally kill Tarrah Nemetz— but the jury did not find an intentional killing. Verdict Forms A3, B3, C3, filed 3/3/16, Supp. CP. Instead, the state proved beyond a reasonable doubt that the killing involved reckless (rather than intentional conduct). Verdict Form C3, Supp. CP.

The state failed to prove Mr. Nemetz was holding the gun "for offensive or defensive purposes." *O'Neal*, 159 Wn.2d at 503–04. The evidence was therefore insufficient for imposition of a firearm

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[1] The *O'Neil-Schelin* language stems from similar language in *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). In that case, while reversing a firearm enhancement for insufficient evidence, the Supreme Court indicated that "[a] person is 'armed' if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes." *Id.*, at 282. The *Valdobinas* court relied on *State v. Sabala*, 44 Wn.App. 444, 723 P.2d 5 (1986), which drew on cases from other jurisdictions. *Id.*, at 448. Similar language has been incorporated into the pattern instruction for firearm enhancements. *See* 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 2.10.01 (4th Ed) ("A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use.") However, in this case, the court's instruction did not include language defining the word "armed." Court's Instructions filed 3/3/16, p. 26, Supp. CP.

enhancement. *See, e.g., State v. Brown*, 162 Wn.2d 422, 435, 173 P.3d 245 (2007). The enhancement must be vacated and the case remanded for correction of the Judgment and Sentence. *Id.*

B. The state constitutional right to bear arms prohibits imposition of a firearm enhancement for an accidental shooting.

Under the Washington Constitution, "[t]he right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired…" Wash. Const. art. I, §24. *Gunwall* analysis suggests that this provision is more protective than the Second Amendment. *State v. Jorgenson*, 179 Wn.2d 145, 155, 312 P.3d 960 (2013) (citing *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)).[2]

1. This court should develop a separate and independent interpretation of art. I, §24, and find that it is more protective than the Second Amendment.[3]

[2] In the wake of *Jorgenson, Gunwall* analysis is likely unnecessary. *See McNabb v. Dep't of Corr.*, 163 Wn.2d 393, 400, 180 P.3d 1257 (2008) ("[I]t is unnecessary to engage in a *Gunwall* analysis where prior case law employing *Gunwall* establishes that a certain state constitutional provision has an 'independent meaning' from the federal constitution"). However, some cases imply that *Gunwall* remains necessary unless the state constitutional provision "independently applies *to a specific legal issue*." *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999) (emphasis added); *see also Centimark Corp. v. Dep't of Labor & Indus. of Washington*, 129 Wn.App. 368, 374, 119 P.3d 865 (2005) ("'…in subsequent cases it is unnecessary to repeat the *Gunwall*-type analysis *of the same legal issue*'") (emphasis added) (quoting *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999)). Because the consequence of omitting a *Gunwall* analysis is so severe, Mr. Nemetz provides a *Gunwall* analysis adapted from the *Jorgenson* opinion.

[3] As noted, this *Gunwall* analysis is adapted from *Jorgenson*, 179 Wn.2d at 152–55.

When comparing the scope of the state and federal constitutions, courts look to six factors: the text of the state constitution, differences in the text of parallel state and federal constitutional provisions, the history of the state constitution, preexisting state law, structural differences between the state and federal constitutions, and matters of particular state interest or local concern. *Gunwall*, 106 Wn.2d at 61–62. These factors show that the state and federal rights to bear arms have different contours and mandate separate interpretation. *Jorgenson*, 179 Wn.2d at 152-55.

Textual language and differences between parallel provisions.[4] Factors one and two "indicate that the firearm rights guaranteed by the Washington constitution are distinct from those guaranteed by the United States constitution." *Id.*, at 152-53. The state constitution protects the individual citizen's right to "bear arms in defense of himself, or the state." Wash. Const. art. I, §24. This phrase is "a necessary and inseparable part of the right," and is missing from the Second Amendment. *Id.* The plain language of the state provision and the difference between the two constitutions show that the Wash. Const. art. I, §24 "should be interpreted separately from the Second Amendment." *Id.*, at 153.

[4] The first two *Gunwall* factors may be examined together because they are closely related. *Jorgenson*, 179 Wn.2d at 152.

Constitutional and common law history. Washington's constitution is patterned on those of other states, which draw from prerevolutionary common law. *Id.* Many early state constitutions couch firearm rights in terms of self-defense or defense of the state. *Id.*, at 154. The difference between the plain text of these other state constitutions and the Second Amendment establish that "the third *Gunwall* factor points toward a separate interpretation." *Id.* In addition, the drafters of our state's constitution rejected language (common in other states) that explicitly recognized the government's power to intrude on the firearm right.[5] They also declined to adopt a proposal against carrying concealed weapons. Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution* 52 (2d ed. 2013). These choices show the framers' commitment to a robust right to bear arms, and strongly suggest that art. I, §24 provides greater protection than the Second Amendment.

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[5] *See, e.g.*, Ill. Const. art. I, § 22 ("Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed"); Ga. Const. art. I, § 1, para. VIII ("The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have the power to prescribe the manner in which arms may be borne"); Tex. Const. art. I, § 23 ("Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime."); Utah Const. art. I, § 6 ("The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms.").

Preexisting state law.[6] This factor requires the examination of non-constitutional sources of state law, which "'may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims.'" *State v. Martin*, 171 Wn.2d 521, 533, 252 P.3d 872 (2011) (quoting *Gunwall,* 106 Wn.2d at 62). This factor also favors independent interpretation of the state constitution. Preexisting state law unrelated to art. I, §24 shows a strong tendency to protect the right to bear arms.

In Washington, a person need not (1) obtain a permit to purchase a firearm, (2) register his or her firearms, or (3) undergo any training in firearm safety. There are no restrictions on the number of firearms that can be purchased at one time, and there are no waiting periods or significant regulations of ammunition sales. Furthermore, Washington is a "shall-issue" state requiring issuance of concealed pistol licenses to applicants who meet criteria. RCW 9.41.070.[7] Washington is also an "open carry" state, restricting only actions taken with intent to intimidate or performed in a manner warranting alarm for the safety of others. RCW 9.41.270. Children can possess and discharge firearms on a relative's property (and in certain other situations as well). RCW 9.41.042. Finally, the state legislature has fully occupied and preempted the field of firearms

[6] The *Jorgenson* court found this factor unhelpful. *Id.*

[7] Furthermore, Washington has permit reciprocity with a number of other states. RCW 9.41.073.

regulation, prohibiting localities from passing stricter gun laws.[8] RCW 9.41.290.

Preexisting state law shows strong regard for the right to bear arms. This suggests that the state constitution should be interpreted separately and independently. *Id.*

Structural differences. This factor always favors an independent interpretation of the state constitution. *Jorgenson.*, 179 Wn.2d at 155; *Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 713, 257 P.3d 570 (2011).

Particular state interest and concern. Firearm ownership and firearm violence vary greatly from place to place. *Jorgenson,* 179 Wn.2d at 155. In addition, principles of federalism and comity require states to take the lead in protecting the rights of criminal defendants. *Id.* This factor also requires courts "to look to the state right separately from the federal right."

As in *Jorgenson, Gunwall* analysis suggests that courts "should interpret the state right separately and independently of its federal counterpart." *Id.* Wash. Const. art. I, §24 prohibits imposition of a firearm enhancement for offenders guilty only of reckless conduct.

[8] By statute, cities, towns, and counties are permitted to enact limited regulation on gun dealers. RCW 9.41.300.

2. The right to bear arms prohibits imposition of a weapons enhancement for a crime involving only reckless conduct.

Constitutional provisions "are to be interpreted as they were at common law in the territory at the time of adoption of the state constitution in 1889." *State v. Haq*, 166 Wn.App. 221, 235, 268 P.3d 997 (2012), *as corrected* (Feb. 24, 2012) (citing *City of Pasco v. Mace*, 98 Wn.2d 87, 96, 653 P.2d 618 (1982)). Wash. Const. art. I, §24 was adopted to prohibit government infringement on the personal right to bear arms.

The framers would not have permitted imposition of a firearm enhancement for a crime based on reckless conduct. This is so because the laws in effect at the time the constitution was adopted provide minimal support for weapons enhancements during commission of an intentional crime, but no support for applying such enhancements to mere reckless conduct.

Washington's first territorial code includes no references to firearms, guns, or rifles, and only two references to pistols. Code of 1854, p. 80 §§28, 30. One of these provisions involving pistols has some bearing to the question at issue here.

The 1854 territorial code declares that "every person who shall assault and beat another with a cowhide or whip, having with him at the time a pistol, or other deadly weapon, shall on conviction thereof, be

imprisoned… not more than one year, nor less than three months."[9] Code of 1854, p. 80 §28.[10] This is the sole provision in which a crime was aggravated by mere possession of a weapon. Significantly, the higher penalty attached to a crime involving intentional conduct: assaulting and beating another with a cowhide or whip. Code of 1854, p. 80 §28.

There do not appear to have been any statutes elevating an offense or enhancing a sentence because the offender possessed a weapon during reckless conduct.[11]

In seeking to protect the right of individuals to "bear arms," the framers of art. I, §24 would have understood that a person who accidentally shoots someone could be guilty of a crime for that shooting, but they would not have tolerated additional punishment simply because the person exercised his constitutional right to bear arms.

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[9] By comparison, the penalty for simple assault included a jail term "not exceeding six months." Code of 1854, p. 80 §30.

[10] The territorial code also criminalized "exhibit[ing] any pistol, bowie knife, or other dangerous weapon" in a "rude, angry, or threatening manner, in a crowd of two or more persons."" Code of 1854, p. 80, §30. Other references to weapons include a prohibition against dueling (Code of 1854, p. 79 §§22-23) and a provision forbidding the smuggling of weapons into jails and prisons (Code of 1854, p. 89 §76). All of these references to pistols and other weapons premise conviction on the offender's intentional act.

[11] This is not to say the territorial and early state legislatures ignored reckless conduct with weapons. *See, e.g.* Code of 1887 p. 100 §1 (prohibiting reckless discharge of a firearm in certain inhabited areas). Rather, the legislature did not enhance or elevate any underlying crime of recklessness simply because the offender carried a weapon.

The firearm enhancement cannot constitutionally be applied to Mr. Nemetz. Wash. Const. art. I, §24. The enhancement must be vacated and the case remanded for correction of the sentence.

II. AS APPLIED TO MR. NEMETZ, THE 2015 AMENDMENT TO RCW 9.94A.505 VIOLATES THE *EX POST FACTO* CLAUSE.

Both the federal and state constitutions prohibit *ex post facto* laws. U.S. Const. Art 1, §10, cl. 1; Wash. Const. art. I, §23. A law violates the *ex post facto* clause if it is applied retroactively and it "increases the quantum of punishment for an offense after the offense was committed." *In re Smith*, 139 Wn.2d 199, 208, 986 P.2d 131 (1999).

The 2015 amendment to RCW 9.94A.505 increased the quantum of punishment for Mr. Nemetz's crime after the offense was committed. Laws 2015, Ch. 287 §10. It therefore violated the *ex post facto* clauses of the state and federal constitutions. *Id.*

An amendment that "limits eligibility for reduced imprisonment violates the *ex post facto* clause when applied to individuals whose crimes were committed before the law's enactment." *Smith*, 139 Wn.2d at 208 (citing *Weaver v. Graham*, 450 U.S. 24, 31–36, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981)). The 2015 amendment limits eligibility for reduced imprisonment, and thus cannot be applied retroactively in Mr. Nemetz's case.

At the time of the offense in this case,[12] all offenders received credit for time served on EHM prior to sentencing. Former RCW 9.94A.505(6) (2014). The 2015 amendment limited eligibility for such credit. Laws 2015, Ch. 287 §10. It prohibited a sentencing court from giving credit for time served on EHM for several offenses, including "violent offenses." Laws 2015, Ch. 287 §10. Manslaughter is a violent offense. RCW 9.94A.030(55)(iii)-(iv).

The court applied the amendment to Mr. Nemetz, even though his crime occurred prior to enactment. This this violates the *ex post facto* clause. *Smith*, 139 Wn.2d at 208; *Weaver*, 450 U.S. at 31–36.

The *Weaver* court held that the *ex post facto* clause "forbids the States to enhance the measure of punishment by altering the substantive 'formula' used to calculate the applicable sentencing range." *California Dep't of Corr. v. Morales*, 514 U.S. 499, 505, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995). The 2015 amendment to RCW 9.94A.505 "enhance[s] the measure of punishment by altering the substantive 'formula'" for calculating the amount of credit for time served, and thus "limits eligibility for reduced imprisonment." *Id.*, *Smith*, 139 Wn.2d at 208.

In *Smith*, the Washington Supreme Court prohibited retroactive application of a statutory amendment imposing a 15% cap on good time

[12] October 16, 2014. CP 1.

credits for certain offenders who could previously earn good time credits for up to 1/3 of their sentences. *Smith*, 139 Wn.2d at 207-208. Similarly, in *Weaver*, the U.S. Supreme Court analyzed a Florida statute that reduced the amount of good time credit inmates could earn. *Weaver*, 450 U.S. at 25. The *Weaver* court found the statute void as applied because it violated the *ex post facto* clause. *Id.*, at 35-36. The court found a violation because the new provision "constrict[ed] the inmate's opportunity to earn early release, and thereby [made] more onerous the punishment for crimes committed before its enactment." *Id.*, at 35-36.

Here, as in *Smith* and *Weaver*, the 2015 amendment made more onerous the punishment for crimes committed before its enactment. At the time of his offense, Mr. Nemetz was eligible to receive credit for time served on Electronic Home Monitoring. CP 1; Former RCW 9.94A.505 (2014). The 2015 amendment limited his eligibility for such credit. Like the laws at issue in *Smith* and *Weaver*, the 2015 amendments violate the state and federal *ex post facto* clauses as applied to Mr. Nemetz. *Id.*; *Smith*, 139 Wn.2d at 208.

III. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant

can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn.App. 380, 385-394, 367 P.3d 612 (2016) *review denied,* 185 Wn.2d 1034 (2016).

Appellate costs are "indisputably" discretionary in nature. *Id.*, at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court's discretionary decisions on appellate costs. *State v. Blazina,* 182 Wn.2d 827, 344 P.3d 680 (2015). Furthermore, "[t]he future availability of a remission hearing in a trial court cannot displace [the Court of Appeals'] obligation to exercise discretion when properly requested to do so." *Sinclair*, 192 Wn.App. at 388.

Mr. Nemetz has been convicted of manslaughter and sentenced to 162 months in prison. CP 35. The trial court determined that he is indigent for purposes of this appeal, and that he is unlikely to be able to pay in the future. CP 44-45. There is no reason to believe that status will change. The *Blazina* court indicated that courts should "seriously question" the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

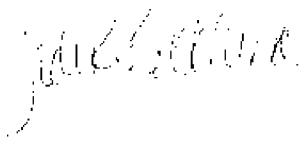
CONCLUSION

For the foregoing reasons, the Court of Appeals should vacate the firearm enhancement and remand Mr. Nemetz's case to the trial court for correction of his sentence. In addition, the Court of Appeals should remand the case with instructions to credit Mr. Nemetz for all time spent on EHM.

Should Respondent substantially prevail and request appellate costs, this court should decline to award them.

Respectfully submitted on November 7, 2016,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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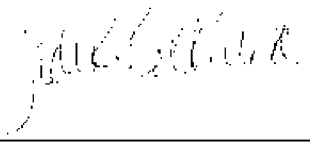
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 7, 2016.



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